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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 879

UNITED STATES OF AMERICA ex rel. GEORGE ATTERBURY,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

George Atterbury, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on November 6, 1956.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported in 237 F. 2d 953 (7th Cir. 1956).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). By order of Mr. Justice Burton, dated January 17, 1957, the time in which to file this petition was extended to and including April 5, 1957.

QUESTIONS PRESENTED.

1) Whether petitioner, an Illinois State Penitentiary inmate, stated a cause of action under the Civil Rights Act, 42 U.S.C. § 1983, when he alleged that the respondent prison officials, acting under color of law, brutally beat him, thereby depriving him of his right not to be subjected to cruel and unusual punishments or deprived of life or liberty without due process of law as guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

2) Whether the complaint of petitioner, an indigent state prisoner who was unable because of his confinement, to appear pro-se when his case was called for trial and who was denied court-appointe counsel, was properly dismissed "for want of prosecution."

STATUTES INVOLVED.

Revised Statutes, § 1979 (42 U.S.C.A. § 1983):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Act of June 25, 1948, c. 646, 62 Stat. 932, As Amended, Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241 (28 U.S.C.A. §1343):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT.

Throughout the proceedings below, petitioner, George Atterbury, was confined in the Illinois State Penitentiary. At all times he was a pauper, unable to pay costs or retain counsel. At no time was he represented by counsel until after the decision of the Court of Appeals.

Petitioner brought this action in the U.S. District Court for the Northern District of Illinois against the warden, assistant warden and two guards of the pentitentiary. The complaint charged that the defendants were liable in damages under the Federal Civil Rights Act, 42 U.S.C. § 1983. It asserted that on two occasions defendants had "unlawfully, knowingly and willfully entered into a conspiracy wherein, while acting under color of State's law and under the guise of discipline, the defendants • • • violently made an assault • • • upon the plaintiff with a dangerous weapon wherein, the plaintiff were inhumanly and viciously beaten upon his personal body for which serious physical injuries were inflicted." (R. 12, 13).

The complaint set out 42 U.S.C. § 1983 in full, (R. 15) and invoked the jurisdiction of the District Court under 28 U.S.C. §1343. (R. 11-12). It cited the Fourteenth Amendment's due process clause and stated that the beatings constituted "cruel and inhuman punishment." (R. 14). It alleged damages (R. 15) and demanded a jury. (R. 16).

District Judge John P. Barnes, under the impression that the complaint was a petition for a writ of habeas corpus, appointed counsel to represent petitioner, and set the case for "hearing" on March 27, 1956. (R. 30). When appointed counsel discovered that the action was for damages, he requested permission to withdraw, stating that "it is not the policy of this Court to appoint attorneys" in such cases. (R. 33). Judge Barnes granted counsel's motion on March 21, 1956. (R. 36). The certified transcript

subsequently filed in the Court of Appeals does not disclose whether notice of this order was ever served on petitioner. (1)

On March 27, 1956, the case was called. Petitioner, still confined, was unable to appear. Judge Barnes thereupon entered the following order: "This cause this day being called for trial and the parties failing to respond thereto on the Court's own motion it is Ordered that the complaint herein be and the same hereby is dismissed for want of prosecution. * * * " (R. 38). No appearance had ever been filed by respondents.

On November 6, 1956, the Court of Appeals affirmed the judgment of dismissal below. The court held that petitioner's complaint stated no cause of action under 42 U.S.C. § 1983.

In January, present counsel entered the case. (Supp. R. 1) Prior to this time petitioner had not been represented by counsel in either the District Court or the Court of Appeals.

On March 7, 1957, a motion for recall of the mandate was filed by counsel for petitioner. (Supp. R. 6) The affidavit accompanying this motion pointed out that in dismissing the complaint, the District Court had ignored Rule 15 (a) of the Federal Rlues of Civil Procedure which provides that a plaintiff may amend his complaint once, as of course, prior to the filing of a responsive pleading. (Supp. R. 9). This motion was denied, the Court of Appeals ruling that petitioner had waived his right to assert non-com-

(1) In their motion to recall the mandate of the Court of Appeals, filed on March 7, 1957, counsel for petitioner informed the Court of Appeals that the docket sheet in the District Court revealed that notice of this order was mailed to petitioner one day prior to the date set for "hearing" by Judge Barnes. (Supp. R. 7)

pliance with Rule 15 (a) by failing to attempt to file an amended complaint after his original complaint had been dismissed. (Supp. R. 10).

REASONS FOR GRANTING THE WRIT.

1) The holding of the Court of Appeals that the complaint of a prisoner alleging a brutal beating by prison officials fails to state a cause of action under 42 U.S.C. § 1983, conflicts with decisions of the Fifth Circuit in *U.S.* v. *Jones,* 207 F. 2d 785 (1953) and *U.S.* v. *Walker,* 216 F. 2d 683 (1954), *cert. den.* 348 U.S. 959 (1955); and with the decision of the Eighth Circuit in *U.S.* v. *Jackson,* 235 F. 2d 925 (1956).

2) The holding of the Court of Appeals that 42 U.S.C. § 1983 does not apply to acts which violate state law, conflicts with the interpretation of § 1983 by the Fifth Circuit in *U.S.* v. *Jones,* 207 F. 2d 785 (1953) and the Ninth Circuit in *Romero* v. *Weakley,* 226 F. 2d 399 (1956).

3) This case presents an important constitutional question which has not been, but should be, decided by this court: whether the due process clause of the Fourteenth Amendment affords the same protection against state-inflicted cruel and unusual punishments which the Eighth Amendment affords against similar action by the Federal Government.

4) The dismissal of petitioner's complaint "for want of prosecution" conflicts in principle with *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

5) The sanction by the Court of Appeals of the dismissal "for want of prosecution" calls for correction by this court in the exercise of its supervisory jurisdiction over the administration of justice in the federal courts.

1. The Court of Appeals affirmed the dismissal of petitioner's complaint on the ground that petitioner failed to state a cause of action under 42 U.S.C. § 1983.

Two circuits have reached conclusions opposite to that reached below. *U.S.* v. *Jackson,* 235 F. 2d (8th Cir. 1956); *U.S.* v. *Walker,* 216 F. 2d 683 (5th Cir. 1954), *cert. den.* 348 U.S. 959 (1955); *U.S.* v. *Jones,* 207 F. 2d 785 (5th Cir. 1953). In each of these cases, a state prisoner was alleged to have been beaten by his keepers. In each, the Civil Rights Act was held applicable and the right to invoke federal jurisdiction upheld.

Jackson, Walker and *Jones* involved criminal prosecutions under the Civil Rights Act; the instant case involves a civil suit under the Act. However, the civil and criminal provisions of the Act are *in pari materia. Picking* v. *Pennsylvania Railroad,* 151 F. 2d 240, 248 (3d Cir. 1945); *Screws* v. *U.S.,* 325 U.S. 91, 99 at note 8 (1945). The Seventh Circuit itself recognizes this principle. *Geach* v. *Moynahan,* 207 F. 2d 714, 717 (7th Cir. 1953). Title 42, § 1983, invoked in the instant case, is in substance the same as 18 U.S.C. § 242, involved in *Jackson, Walker* and *Jones,* except for the difference in the sanction provided. Therefore, the decision below has created a square conflict between the Circuits. ([2])

2. The court below avoided the constitutional issue presented in this case by reading an unwarranted exception into the Civil Rights Act. Thus, the court stated

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([2]) Three district court decisions also conflict with the decision below: *McCollum* v. *Mayfield,* 130 F. Supp. 112 (N.D. Cal. 1955); *Siegel* v. *Ragen,* 88 F. Supp. 996 (N.D. Ill. 1949) (decision as to plaintiff Harp); *Gordon* v. *Garsson,* 77 F. Supp. 477 (E.D. Ill. 1948).

that petitioner's charges "do not state a claim • • • under the • • • Act" because " 'The common law provides adequate action against errant law enforcement officials.' " 237 F. 2d 953 at 955, Appendix A, p. 15.

Jurisdiction to entertain Civil Rights complaints is vested in the District Courts by 28 U.S.C. § 1343. Neither this section nor 42 U.S.C. § 1983 makes any exception for acts which also violate state law. Other Courts of Appeal have refused to read such an exception into the Act. *U.S.* v. *Jones,* 207 F. 2d 785 5th Cir. 1953) passed upon the precise point and squarely opposes the holding below. And in *Romero* v. *Weakley,* 226 F. 2d 399, 401 (1956), the Ninth Circuit held that, in dismissing a Civil Rights complaint, a district court had acted "from a viewpoint exactly contrary to this obvious purpose of the civil rights legislation to give the litigant his choice of a federal forum rather than that of a state."

The question is basic to the application of the Act and the conflict should be resolved by this court.

3. To state a cause of action under 42 U.S.C. § 1983, three things are necessary: the plaintiff must be within the jurisdiction of the United States; he must show that the defendants acted under color of law; and he must show that the acts alleged deprived him of a right, privilege, or immunity secured by the Constitution.

The first two requirements are clearly met by petitioner's complaint. (R. 12) The only remaining question is whether petitioner properly alleged the violation of a Constitutional right.

The complant alleged a brutal beating by prison officials (R. 12) which infringed petitioner's rights under the Fourteenth Amendment's due process clause. (R. 14).

Whether the Fourteenth Amendment affords protection against cruel and unusual punishments has been considered but never decided by this Court.

In *Louisiana* ex rel. *Francis* v. *Resweber,* 329 U.S. 459, 462 (1947), this court said: "* * * we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Eighth Amendment * * * as to * * * cruel and unusual punishment would be violative of the due process clause of the Fourteenth Amendment."

In both *Johnson* v. *Dye,* 338 U.S. 864 (1950) and *Sweeney* v. *Woodall,* 344 U.S. 86 (1952), the same question was presented but not decided.

It is hard to imagine a right more fundamental than the right to be free from cruel and unusual punishments. Such conduct as charged here on the part of prison functionaries is indeed "calculated to discredit law and thereby to brutalize the temper of a society * * * " *Rochin* v. *California,* 342 U.S. 165, 174 (1952). This court should set at rest any doubt that the Fourteenth Amendment affords protection against such conduct.

4. Even though the Court of Appeals erred in holding that petitioner stated no cause of action, the result below may be correct if the District Court properly dismissed the complaint "for want of prosecution." The propriety of that action is therefore an additional issue before this Court.

In the instant case petitioner was indigent (R. 5-9, 20) and appeared pro-se. District Judge Barnes denied him court-appointed counsel. (R. 36). The case was dismissed

"for want of prosecution" when petitioner failed to appear in court on the appointed day because of his confinement. (R. 38).

This ruling discriminated against petitioner because of his poverty. It conflicts in principle with the decision of this court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). In *Griffin*, this court denounced an Illinois procedure which, in effect, discriminated between rich and poor in makng appellate review available to those convicted of crime; the court held that the Fourteenth Amendment prohibited such a discrimination.

The District Court below will not appoint counsel in suits under the Civil Rights Act. Because he is confined, the poor prisoner cannot appear pro-se when his case is called. Thus, the petitioner and others who cannot afford to hire counsel are effectively denied their rights under the statute. A far less shocking condition was condemned in *Griffin*.

5. Under the "all writs" section of the Judicial Code, 28 U.S.C. § 1651, the District Court might have issued an ancillary writ of habeas corpus comanding the production of the petitioner so that he might argue his own case. *Price* v. *Johnson*, 334 U.S. 266 (1948). In the alternative, the court had power to appoint counsel for petitioner, even though petitioner's case was an action for damages. 28 U.S.C. § 1915 (d). Either way, the unreasonable result reached by a dismissal for want of prosecution—refusal to hear a prisoner's proof of unconstitutional violence—is avoided.

This court has the power and responsibility to supervise lower federal courts so as to insure maintenance of "civilized standards of procedure." *McNabb* v. *United States*, 318 U.S. 332, 340 (1945). A dismissal for want of prosecution as the necessary result of a plaintiff's poverty, is such a departure from the accepted and usual standards of judicial proceedings as to call for the exercise of this Court's supervisory power.

Conclusion.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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